No. 88-1139

SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CERTIFIED REGISTERED NURSE ANESTHETISTS OF ANESTHESIA GROUP PRACTICE, RONALD W. ERB, KATHLEEN ERB, JOANN JOHNSON BLAKE, DAVID R. PAUL, SUSAN PAUL, JUDIE SCALFANI, and JERRY ZOELLER

Petitioners

vs.

ANESTHESIA GROUP PRACTICE, INC., CLAYTON L. SCROGGINS & ASSOCIATES, JOSEPH M. CASPER, M.D., JOSEPH POSSERT, M.D., RICHARD ROHRER, M.D., WILLIAM DALTON, M.D., ASHVIN ZUMKHWALA, M.D., ANDRES BELUAN, M.D., and LITO ALINO, M.D.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO HAMILTON COUNTY

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Law of ERISA Preempt All State Causes of Action Relating To Pension And Profit-Sharing Plans, Including Petitioners' Claims for Alleged Breaches of Funding Levels of the Plans?

2. Do State Law Claims For Increased Funding Of Employee Benefit Plans "Relate To" Those Plans To The Effect That Those Claims Are Preempted in Accordance With Controlling Federal Law?

3. Under the Federal Common Law of ERISA, Are Alleged Oral Or Informal Written Agreements That Attempt To Vary The Terms of Written ERISA Plans Enforceable?

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Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO HAMILTON COUNTY

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Petitioners seek discretionary review by this Court of the unanimous decisions of the state courts below granting (or affirming) summary judgment in favor of Respondents. These

decisions resulted from a finding that Petitioners' Complaint for "breach of contract"[1] is preempted by federal law, particularly the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* The Ohio courts also held that, when judged under the applicable federal common law of ERISA, Petitioners' claim of an oral agreement that contradicted the terms of Respondents' written ERISA plans could not survive summary judgment. Both the trial court and the Ohio First District Court of Appeals correctly ruled that ERISA "supercedes state common law or laws relating to employee benefit plans," (Petition, at 11a, Trial Court Decision), and "the breach of contract claim together with the claim against Scroggins is in connection with employee-benefit plans, and those claims are preempted insofar as they are grounded in the common law of Ohio." (Petition, at 5a, Court of Appeals Decision).[2] The Ohio Court of Appeals also affirmed that Petitioners had failed to establish a claim under ERISA. The Ohio Supreme Court denied discretionary review of the lower courts' decisions.[3]

On November 20, 1985, Petitioners filed their Complaint against Respondents Anesthesia Group Practice, Inc., all of its shareholders and its business consultant (Respondents will be collectively referred to herein as "AGP"). The rambling twenty-two page Complaint alleged that AGP failed to make contributions for several years to the corporation's ERISA pension and profit-sharing plans in accordance with alleged

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[1] Petition, at 18a (Complaint, ¶ 1: "This is an *action for breach of contract* by the employees of Anesthesia Group Practice, Inc. against their employer for failing to make contributions to the retirement fund. . . .") (emphasis added).

[2] Both decisions are included as appendices in the Petition and therefore have not been attached to this Brief in Opposition. Neither the trial court decision nor the intermediate Court of Appeals decision have been published in any Ohio case reporter.

[3] *See* 39 Ohio St. 3d 712 (1988) (motion to certify denied); 39 Ohio St. 731 (1988) (motion for rehearing denied).

oral statements to each Petitioner to contribute an amount equal to 25% of each such Petitioner's income to AGP's pension and profit-sharing plans.

Discovery demonstrated that even though Petitioners did sign written employment agreements, they made no claim based upon any written contract for pension or profit-sharing plan benefits in this case. Rather, the Complaint encompassed nine separate oral contracts (one for each Petitioner),[4] each claimed agreement directly contradicting the terms of AGP's written ERISA plans that have existed continuously since before the time that every one of the Petitioners was hired by AGP. The Complaint sought a judgment requiring additional contributions to the ERISA plans that greatly exceeded those specified in the plan documents.[5] While AGP denies Petitioners' allegation of the existence of oral contracts, resolution of this factual question was not material to the outcome in the trial court or on appeal (or before this Court) as Petitioners' claims are (i) preempted insofar as they are based on state law, and (ii) when judged under federal ERISA law, insufficient to survive summary judgment.

The Petition for a writ of certiorari is simply a rehash of the same arguments that have been rejected by each court hearing them on the merits, as well as by the Ohio Supreme Court, which has denied review on two occasions. Not a single new case has been cited to this Court to justify yet another appeal. The writ of certiorari should be denied for the reasons that:

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[4] After the trial court decision, AGP was informed that Plaintiff Susan Dolph no longer wanted to be part of the appeal and has dropped all claims against AGP. After the Ohio Supreme Court denied review, two other Plaintiffs, Richard Everett and Linda Fein, dropped out.

[5] Although the Complaint initially contained class-action allegations, Petitioners never moved to certify a class, and by their actions, have abandoned any class claims. No employee of AGP asked to join the action after its filing.

1. The plain wording of 29 U.S.C. § 1144(a) and numerous cases thereunder establish that ERISA preempts all claims based on state law relating to an ERISA plan, including the Petitioners' state law claims in this case;

2. Pursuant to the federal common law of ERISA as enunciated by the federal courts, particularly as stated in *Nachwalter* v. *Christie*, 611 F. Supp. 655 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986), alleged oral or informal written modifications that seek to contradict or vary the terms of an ERISA plan are not enforceable under ERISA;

3. There has been no merit review of this case by the Ohio Supreme Court, and there is no conflict between the decisions by the inferior Ohio courts in this case and any federal court of appeals or this Court; and

4. The decisions of the lower Ohio courts followed the Ohio Supreme Court's decision in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 516 N.E.2d 1236 (1987), which adopted controlling federal law on the subject of ERISA preemption and cited *Nachwalter*, *supra*, with approval.

Well established legal principles and precedents have been correctly applied by the Ohio trial and appeals courts below, and there is no reason for this Court to restate the principles of ERISA preemption when no conflict exists.

Supplement of Pertinent Facts

Because Petitioners attempt in their brief to ignore or mischaracterize factual findings of the Ohio courts, it is necessary to supplement the Statement of Facts. Petitioners were among the employees of AGP at times material to their claims. AGP set up a qualified ERISA pension plan and a qualified ERISA profit-sharing plan for all of its employees

prior to the employment of any Petitioner herein. The pension and profit-sharing plans were documented and filed in accordance with ERISA's "written agreement" requirement. 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument"). The courts below found "[i]t is not disputed that AGP followed these formulae each year" and AGP funded the plans in complete compliance with the terms of the written plan documents. (Petition, at 4a, Court of Appeals Decision).

For the entire period relevant to the Complaint (1979-1984), the pension plan document contained the applicable formula, which stated that AGP's contributions would be 5% of the employee's salary up to the social security (FICA) wage limit, and 12% for everything above that limit. This formula was precisely followed in every year for every Petitioner (as well as for every other AGP employee). The profit-sharing plan document stated that AGP retained full discretion to choose a funding level at the end of each fiscal year. (Petition, at 4a-5a n.2-3, Court of Appeals Decision). Discretionary contributions were made each year in the same percentage of income for *every* AGP employee, including Petitioners.[6]

Every year, AGP gave each Petitioner a separate financial statement showing the exact amount of contributions for his or her benefit to the pension plan and to the profit-sharing plan. For example, Petitioner Ronald Erb testified in discovery that he reviewed his annual statements each year, noted that the contributions were less than he thought he was

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[6] Petitioners would have this Court relitigate these facutal findings of the Ohio courts in stating that the provisions of the plans are "not inconsistent with the promised finding." (Petition, at 6). This Court should deny Petitioners' invitation. *See Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 538 (1951) ("Of course, . . . we have the power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence").

orally "promised," discussed the matter on several occasions with other nurses and doctors, took no further action, "acquiesced," and went back to work for the next year. Thus, each Petitioner knew what he or she was receiving in the ERISA plans during any given year.

Petitioners also admit to receiving complete written financial statements showing plan contributions, to the penny, for each year of his or her employment at AGP, but each now claims that his or her employee benefit plan balances should be increased in accordance with alleged oral "promises" made by different hiring doctors in different years of initial employment interviews. They would have the courts ignore the written pension plans that contradict (and that actually govern) their claims, ignore the Summary Descriptions of the plans distributed over the years to each Petitioner that also contradict the alleged "oral promises," ignore the annual financial statements, ignore detailed financial analyses given to each Petitioner by a personal investment advisor made available to them at AGP's expense, ignore plan modification notices sent to each of them, and so on.

Petitioners contend that their ostrich-like approach to the facts regarding the funding of their ERISA plans and their perennial acquiescence in receiving plan benefits now entitles them to assert a claim for retroactively increased funding of the plans, as well as recovery of assumed past and future earnings. Although the foregoing recitation of facts is not centrally material to this attempted discretionary writ, it does serve at least one useful purpose: it clearly demonstrates why Congress and the federal courts have preempted the field in this area. It is exactly this type of dispute to which ERISA preemption is directed. Under established federal ERISA law, the written document controls, not each participant's version of an oral claim that the plan should be rewritten for one, some, or even all beneficiaries and judicially funded at levels higher than the plans provide and the yearly written reports confirm.

SUMMARY OF ARGUMENT

A. United States Supreme Court and lower court authorities are in universal agreement that federal preemption under ERISA is one of the most sweeping federal preemption sections ever passed by Congress. The applicable ERISA statute specifically preempts all state law, including common law, that "relates to" employee benefit plans. The "relates to" standard is to be given its common sense meaning and applied broadly.

B. The state law claims of Petitioners that seek to modify (by increasing greatly) the funding levels of the ERISA plans, and that are at variance with the express provisions of the plans followed precisely by AGP for each Petitioner, "relate to" those plans and in fact are central to them, as the Ohio courts have held. Numerous federal courts have held that these types of claims are therefore preempted by federal law—and no court has held to the contrary.

C. Under the federal common law of ERISA, which state courts are bound to apply, Petitioners' attempts to modify or contradict the written funding levels contained in the ERISA plans by alleged oral or informal written agreements could not survive summary judgment on the record before the lower Ohio courts. This result is consistent with the holdings of every circuit court of appeals that has addressed the issue. That the Tenth and Eleventh Circuits support this proposition demonstrates that the Ohio trial and intermediate courts properly applied federal common law in dismissing Petitioners' Complaint. Despite Petitioners' argument that the decisions in the instant case conflict with federal authority, quite the opposite is apparent upon even a cursory review of the federal cases.

As a result of the above, there is no reason for this Court to review the decision of Ohio's First District Court of Appeals.

ARGUMENT

A. It Is Well Settled That The Federal Law of ERISA Preempts All State Causes of Action Relating to Pension And Profit-Sharing Plans, Including Claims for Alleged Breach of Contract, Because ERISA's Express Statutory Preemption Provision Bars All State Law Claims That "Relate To" Employee Benefit Plans.

The haphazard review of cases in the Petition for a writ of certiorari, like Petitioners' briefs submitted to the Ohio courts, tries mightily to avoid the wording of the controlling legal standard in this case: ERISA's express preemption provision. Instead, Petitioners distract this Court from the clear ERISA provision by avoiding discussion of the statutory standard. The general preemption section of ERISA states as follows:

> Except [in circumstances not relevant here], the provisions of this title and title IV *shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in section 4(a) [29 U.S.C. § 1003(a)] of this title and not exempt under section 4(b) [29 U.S.C. § 1003(b)] of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a) (emphasis added). As this Court has repeatedly instructed, the ERISA preemption section is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987) (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)); *see also Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) ("The preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements"). Nor, as this Court has emphasized, is preemption "limited to 'state laws specifically designed to affect employee benefit plans.' " *Pilot*

Life, 481 U.S. at 47-48 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)). Rather, the phrase "relate to" must be "given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.' " *Pilot Life*, 481 U.S. at 47 (quoting *Metropolitan Life*, 471 U.S. at 739, quoting *Shaw*, 463 U.S. at 96).

Taking their lead from this Court, lower federal courts and the Ohio Supreme Court agree that ERISA contains one of the most expansive federal preemption sections ever passed. *See, e.g., Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1146 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986) ("In ERISA, Congress made its intent known in what has been called 'the most sweeping federal preemption statute ever enacted by Congress' "); *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 516 N.E.2d 1236 (1987). "The term 'State law' as used in ERISA's preemption provision includes all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1). As both lower Ohio courts in this case correctly held, this includes state common law.[7]

Petitioners do not dispute that both the AGP pension plan and the AGP profit-sharing plan are employee benefit plans covered by ERISA. Thus, any state claims "relating to" these plans are preempted by federal law.[8]

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[7] This holding is consistent with the Ohio Supreme Court's decision in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St 3d 87, 91, 516 N.E.2d 1236, 1240 (1987), as well as federal authorities.

[8] This Court cited to Black's Law Dictionary in formulating the broad "relate to" standard of ERISA. "Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association or connection with." *Shaw* v. *Delta Air Lines*, 463 U.S. at 98 n.16 (1983). This is the preemption standard that the Ohio courts properly applied to the facts of this case. Upon review of the cases, the only limitations on the foregoing standard are when there is no written plan involved or when the claim "relates to" an ERISA plan only in a manner where "any palpable effect" is "tenuous, remote, or peripheral."

ERISA preemption goes well beyond specific state regulation of retirement plans, contrary to Petitioners' argument. *See, e.g., Holland*, 772 F.2d at 1147 ("A broad reading of the phrase 'relates to' is consistent with the legislative history and policies behind ERISA. Congress rejected a narrower preemption provision that would have preempted only state laws dealing directly with ERISA plans").[9]

The Ohio Court of Appeals correctly applied the plain meaning of ERISA's preemption provision as stated in the federal cases and as adopted by the Ohio Supreme Court in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 516 N.E.2d 1236 (1987). In *Ralyon*, the plaintiffs claimed that their coverage under their ERISA medical plan was misrepresented to them by their employer, the plan's sponsor. The Ohio Supreme Court applied ERISA's broad preemption standard and dismissed all state law claims:

> A state common-law claim asserting express, willful and malicious misrepresentation against a self-insured employee benefit plan is pre-empted by ERISA.

Id. at 87, 516 N.E.2d at 1237 (Syllabus ¶5). In addition, the *Ralyon* court held that a contract theory of recovery likewise was barred by ERISA preemption. *Id.* at 92, 516 N.E.2d at 1242 ("Accordingly, the alternative contract rationale urged in support of the Ralyons' cause of action is pre-empted. The effect of pre-emption in this instance is to vacate the award of benefits because the award is based upon state law").

Because the Ohio lower courts recognized and properly applied the preemption standard used by this Court, the lower federal courts, and Ohio's Supreme Court, there is no reason to review the Ohio court's decision.

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[9] *See also Shaw* v. *Delta Airlines, Inc.*, 463 U.S. at 98 (1983) ("The Conference Committee rejected these provsions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language"). The reason for this broad form of preemption is clear: it "enables both the employer and employee to look to one source for their obligations and expectations, thereby eliminating this very type of dispute." (Petition, at 10a, Trial Court Decision).

B. State Law Claims For Increased Funding Of Employee Benefit Plans "Relate To" Those Plans And Thus Are Preempted In Accordance With Controlling Federal Law.

The goal of Congress in enacting ERISA was to create a uniform body of federal law so as to replace the conflicting and inconsistent approaches taken by the states and their respective court systems. Thus, while state courts have concurrent jurisdiction over claims in this area, state courts are *bound* to apply federal interpretations of the federal common law of ERISA. *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) (stating that body of federal substantive law was to develop and determine rights under employee benefit plans); *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 92, 516 N.E.2d 1236, 1241 (1987) ("This application of state law cannot stand under ERISA's pre-emption provisions").[10]

Petitioners are attempting to require funding of their individual ERISA employee benefit plans in accordance with alleged oral promises. Funding of the plans obviously "relates to" the plans for preemption purposes, as both Ohio courts held. It directly determines the level of benefits available to plan participants. Petitioners' state law claims are thus preempted by the plain wording of ERISA.

The preemption determination of the trial and intermediate Ohio courts is consistent with literally scores of federal cases, as well as the Ohio Supreme Court's decision in *Richland Hospital, Inc.* v. *Ralyon*, *supra*, each of which

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[10] *Accord Authier* v. *Ginsberg*, 757 F.2d 796, 802 (6th Cir.), *cert. denied*, 474 U.S. 888 (1985) (allowing remedies to turn upon state-court interpretation of ERISA is contrary to congressional intent); *Ogden* v. *Michigan Bell Telephone Co.*, 595 F. Supp. 961, 967 (E.D. Mich. 1984) (concurrent jurisdiction does not mean local law should be applied as the federal standard); *Northeast Department ILGWU Health and Welfare Fund* v. *Teamsters Local Union No. 299 Welfare Fund*, 764 F.2d 147, 158 (3d Cir. 1985) (federal common law supplies the rule of decision, and state courts are to apply it); *Hollenbeck* v. *Falstaff Brewing Corp.*, 605 F. Supp. 421, 429 (E.D. Mo. 1984), *aff'd*, 780 F.2d 20 (8th Cir. 1985) (uniform body of federal common law and federal rules of decision to control).

holds that ERISA preempts *all* state law claims that relate to the plans. *See, e.g., Holland*, 772 F.2d at 1147 ("Preemption applies to a state cause of action under common law as well, for the state breach of contract and estoppel claims pose the same potential as the statutory cause of action for conflicting employer obligations and variable standards of recovery. . . . ERISA and the policies underlying it require preemption").[11]

Contrary to Petitioners' assertion of a "direct conflict with decisions of other courts including federal courts of appeals of the Third, Ninth and Eleventh Circuits" (Petition, at 10), there is no such conflict at all. For example, in *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985), former employees sued their employer alleging, *inter alia*, violations of state common law. The trial court granted summary judgment to defendants on all state law causes of action in the complaint, stating as follows:

> Defendants moved for partial summary judgment on plaintiffs' state law claims based on ERISA preemption. The district court granted the motion, and the order dismissing the first, second, third, fourth, fifth and seventh causes of action was entered May 18, 1983. . . . The district court was correct in finding that ERISA preempted plaintiffs' state common law causes of action.

Id. at 1356. The Ninth Circuit in *Blau* affirmed dismissal of causes of action on "state common law theories of liability (breach of contract implied in fact; promissory estoppel; estoppel by conduct; fraud and deceit; and breach of contract)." *Id.*[12]

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[11] *Accord Lafferty* v. *Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982) (state law breach of contract claim preempted); *Calhoun* v. *Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979) ("Since this Severance Plan is within the coverage of ERISA, plaintiff's count alleging breach of contract will be dismissed").

[12] Petitioners impliedly concede that *Blau* is federal common law authority *contrary* to their argument on these supposed conflicts, as they do not

Even the Ninth Circuit case that Petitioners cite to this Court in fact *supports* ERISA preemption of their common law claims, rather than justifies this Court's granting certiorari. In *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), the plaintiffs attempted to state a claim for a "Breach of Employment Agreement" relating to an ERISA plan:

> Plaintiffs alleged that Gulf 'expressly and impliedly promised, *orally* and in writing' to pay severance pay to plaintiffs upon their termination of their employment with Gulf, at a rate of two weeks salary for each year of employment with Gulf, but failed to do so.

Id. at 1501 (emphasis added).

The Ninth Circuit made short work of plaintiffs' argument that their state law claim was not preempted by ERISA:

> A. First Claim "Breach of Employment Agreement". Plaintiffs' First Claim asserts no more nor less than plaintiffs were denied benefits due them under the terms of an employee welfare benefit plan. The claim is therefore pre-empted by ERISA.

Id. at 1505. The *Scott* holding on ERISA preemption applies to the instant case with full force to preempt Petitioners' claims for alleged breaches of oral agreements to fund AGP's employee welfare benefit plans. Thus, Petitioners' citation to *Scott* as authority that employment contract claims should

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even cite this Ninth Circuit case to the Court. *See also Turner* v. *Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 541 (N.D. Ohio 1987) ("Clearly, plaintiff's common law contract actions for breach of an oral agreement, for recovery under promissory estoppel, and for detrimental reliance are preempted by ERISA"; summary judgment for defendants). Likewise, in *Ogden* v. *Michigan Bell Telephone Co.*, 571 F. Supp. 520, 521 (E.D. Mich. 1983) (again not cited by Petitioners), the court dismissed plaintiffs' common law causes of action for "equitable estoppel," "breach of employment contract," "breach of contract to retire," "promissory estoppel," "innocent misrepresentation," and "common law fraud." For preemption purposes, Petitioners' breach of contract action is no different than that in *Ogden*.

not be preempted under ERISA is patently inaccurate, as is the claimed "direct conflict" with the Ohio courts' decisions herein.[13]

Petitioners' reliance upon another Ninth Circuit decision in *California Hospital Association* v. *Henning*, 770 F.2d 856 (9th Cir. 1985), *cert. denied*, 477 U.S. 904 (1986), is also misplaced. Like several other cases cited by Petitioners, *Henning* has nothing to do with preemption of an alleged state law breach of contract claim. Rather, it involved a declaratory judgment regarding whether a United States Department of Labor regulation *excluding* certain vacation programs from the definition of "employee welfare benefit plan" was a valid regulation: "If the regulation is valid [the vacation programs] are not within ERISA and are not affected by ERISA's preemption provision. The sole question, therefore, is whether the regulation is valid." *Id.* at 858. The Ninth Circuit found that this *federal* regulation was valid and thus expressly excepted it from ERISA's coverage (including ERISA's preemption provision). The *Henning* decision, therefore, deals with an express federal exception to ERISA that, like the statutory exemption in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985), is notably absent from this case.

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[13] The only claim the *Scott* court did not hold to be preempted was plaintiffs' claim that Gulf had tortiously interfered by preventing Thrifty, their new employer, from providing any welfare benefit plan to them in connection with their future employment. The court held that, as there was no benefit plan of any type in existence at Thrifty after the refinery sale, the claim of tortious interference did not relate to an existing plan covered by ERISA. Accordingly, this claim was not preempted. However, in so holding, the Ninth Circuit was careful to note that this claim "does *not* raise any issues concerning the matters regulated by ERISA, namely, the administration, reporting, disclosure, *funding*, vesting, and enforcement of benefit plans." 754 F.2d at 1505 (emphasis added). In sum, the *Scott* court held that all claims relating to Gulf's ERISA Plan, including plaintiffs' claim of oral or written promises on the part of Gulf, were specifically preempted by ERISA. *Id.* at 1501, 1505.

In a like manner, Petitioners' heavy reliance upon a "direct conflict" with the Third Circuit in *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982), misses the mark. Rather than authorizing Petitioners' state breach of contract claims to be asserted in an ERISA action, the *Murphy* court stated that state law did *not* control; instead, the federal common law of ERISA governed:

> *The employees' contract claim against the employer is not a state law claim.* Rather, their claim arises under both the federal common law of labor-management contracts, and the federal common law of pension plans. . . . Moreover, except for the explicitly exempted plans, ERISA wholly regulates and federalizes the pension field.

Id. at 237 (emphasis added). In this case, the federal common law of ERISA as stated by the Eleventh Circuit in *Nachwalter* v. *Christie*, 611 F. Supp. 655 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986), applies to render unenforceable Petitioners' oral modification claims, as the Ohio courts correctly held. Once again, while simply reading the Petition would lead one to believe *Murphy* was on point in their favor, a review of the opinion proves that it is directly contrary to Petitioners' position and is, in fact, supportive of AGP's position.[14]

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[14] Petitioners also cite several non-federal and non-Ohio state courts in their effort to distract this Court from the point at hand. Put simply, state court decisions from California or New York are *not* part of the governing federal common law of ERISA, and thus do not even constitute persuasive authority for Petitioners' burden in this Court. Moreover, Petitioners' reliance on these state cases is groundless for additional reasons as well. For example, in *Sasso* v. *Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359 (1985), the New York Court of Appeals held that a section of New York's corporation law allowing collection of corporate debts from shareholders was not preempted by ERISA, although it recognized this Court's ruling that "the phrase 'relates to' found in Section 514(a) of ERISA must be interpreted broadly as its plain language indicates." *Id.* 484 N.E. 2d at 1361. However, the court found no preemption of the state statute because, "[i]f the statute

Petitioners' reference to alleged conflicts does not weaken the inescapable conclusion that their claims "relate to" (in fact, go to the heart of) AGP's plans and thus are preempted by federal law.[15] Despite Petitioners' long-winded efforts to distract attention away from it, the primary legal question before the Ohio courts was a narrow one: Does ERISA preempt claims for breach of oral contracts to fund ERISA welfare benefit plans? The answer to this question was an equally direct "yes," as both Ohio courts found. Because this determination is consistent with the many ERISA cases decided by this Court, as well as numerous lower federal court decisions, there is no substantial issue for this Court to review.

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has any palpable effect on the plan, it is the type of tenuous, remote, or peripheral effect that ERISA was not meant to preempt." *Id.* 484 N.E.2d at 1362. Unlike the instant action, *Sasso* did not deal with a state breach of contract claim or any other common law claim pressed to secure increased funding of an ERISA plan. The plaintiffs in *Sasso* alleged no oral agreements relating to the funding of an ERISA plan, which claim would obviously have more than a "tenuous, remote, or peripheral" impact on an ERISA plan. Furthermore, even New York state's courts recognize the rule in *Nachwalter*. *See Pirrelli* v. *Schiavone Construction Co.*, 529 N.Y.S.2d 2, 3 (App. Div. 1988) ("Moreover, even if the Statute of Frauds does not apply, an oral agreement which modifies written employee benefit plans governed by the Employee Retirement Income Security Act of 1974 . . . is illegal and unenforceable (see, *Nachwalter* v. *Christie*)").

[15] Unlike the instant case, the decision in *Martori Brothers Distributors* v. *James-Massengale*, 781 F.2d 1349 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986), which is highlighted in the Petition, falls into that line of cases where the effect of the regulation on the retirement plan is "too tenuous, remote, or peripheral" to be considered to "relate to" an ERISA plan. This limited exception to ERISA's broad preemption has no application here as Petitioners' claims go to the very heart of AGP's plans: their funding levels.

C. Under the Governing Federal Common Law Of ERISA, Alleged Oral or Informal Written Agreements That Attempt To Vary The Terms of Written ERISA Plans Are Not Enforceable.

Consistent with their obligation (as acknowledged in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 516 N.E.2d 1236 (1987)) to apply the governing federal law of ERISA, the Ohio courts held that the Petitioners' claims of breach of an oral or informal contract that contradicted AGP's written ERISA plans could not survive summary judgment. *See Nachwalter* v. *Christie*, 611 F. Supp. 655, 661 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986) ("The requirement that pension and profit-sharing plans be established and maintained pursuant to a written agreement precludes the alteration of a plan pursuant to an oral agreement").

In *Nachwalter*, the trial court confronted allegations similar to the instant case; namely, that the trustees of an ERISA plan reached an alleged *oral* or *informal agreement* with a plan beneficiary-employee to value his account balance and to render lump-sum payments to the beneficiary. This alleged oral promise was contrary to the terms of the written plan instrument. The court rejected the argument that the alleged oral agreement was of any legal effect:

> An oral agreement cannot be the basis of a cause of action under ERISA due to the fact that such an oral agreement would be contrary to the express provisions of ERISA. . . .
>
> This express requirement of a written agreement is inconsistent with defendant's attempt to prove a legally enforceable oral agreement.

611 F. Supp. at 661.

In its opinion affirming the district court, the Eleventh Circuit first squarely framed the federal common law issue: "The main issue on appeal is whether written employee benefit

plans governed by ERISA may be modified by oral agreements." 805 F.2d at 959. The court of appeals then directly held that oral modifications to a written ERISA plan were not enforceable:

> We agree with the district court that this requirement that ERISA plans be 'maintained' in writing precludes oral modifications of the Plans; the common law doctrine of estoppel cannot be used to alter this result.

805 F.2d at 960. The court further affirmed that even informal *written* modifications were unenforceable:

> The conclusion that under ERISA oral modifications of employee benefit plans are impermissible is buttressed by the observation that Congress expressly prohibited informal written amendments of ERISA plans.

805 F.2d at 960.

The Tenth Circuit has also followed *Nachwalter* in *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988), by holding that an employee's claims against his former employer for breach of contract and negligent misrepresentation were preempted by ERISA:

> Following the lead of the Eleventh Circuit, we hold that no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan.

Id. at 1265. As in the instant case, the employee in *Straub* received benefits according to the express terms of the written plan. *Id.* at 1266 ("Because Straub is receiving the benefits to which he is entitled under the express terms of defendant's employee benefit plan, he has no cause of action under ERISA").

It is undisputed — and has been found as a matter of fact in the instant case by the Ohio courts — that Petitioners' plans were funded in strict accordance with the written ERISA plans. (Petition, at 8a, Court of Appeals Decision).

The courts below further found that Petitioners' claimed oral modification of the written plans is contrary to the plan documents themselves. (Petition, at 11a, Trial Court Decision) ("The manner, in which the alleged agreements altering the funding levels of the benefit plans were made, is not in accord with Article VIII of either the AGP Pension or Profit-Sharing Retirement Plans"). As a result, the lower Ohio courts correctly applied the above federal decisions in holding that Petitioners were not free to contradict their ERISA plans through claims of oral modification.

Additional federal common law support for the lower courts' decision can also be gleaned from cases interpreting the Labor Management Relations Act (LMRA). Reviewing courts have held that ERISA and LMRA contain many similar provisions and that consistent interpretation of the similar provisions is warranted. *Jung* v. *FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Nachwalter* v. *Christie*, *supra*; *Straub* v. *Western Union Telegraph Co.*, *supra*; *Hugh* v. *Overly*, 445 F. Supp. 946 (W.D. Pa. 1978); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 5038, 5107.

The LMRA, like ERISA, precludes alteration of written plans by oral agreement. *See San Pedro Fishermen's Welfare Trust Fund* v. *DiBernardo*, 664 F.2d 1344 (9th Cir. 1982); *Reiherzer* v. *Shannon*, 581 F.2d 1266 (7th Cir. 1978); *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (3rd Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); *Hugh* v. *Overly*, *supra*; *Mo-Kan Teamsters Pension Fund* v. *Creason*, 716 F.2d 772 (10th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984).

The federal common law rationale for voiding oral statements in favor of the original express agreement was explained in *San Pedro*:

> Oral statements regarding the meaning of a written trust fund agreement are difficult to prove and judicial recognition of some oral statement may invite collusion and controversy to the detriment of the beneficiaries.

Id. at 1345.[16] Similarly, federal law here prevented Petitioners from rewriting the terms of AGP's retirement plans to suit their own needs. Those written terms, consistent with ERISA, must be applied in a nondiscriminatory fashion to all eligible participants.[17]

Finally, the Ohio Supreme Court in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 92 n.10, 516 N.E.2d 1236, 1242 n.10 (1987), cited with approval to *Nachwalter* v. *Christie*, *supra*, as part of the "developing federal common law of ERISA," and noted that the "federal courts have refused to apply common-law theories of oral modification." In *Ralyon*, after the Court dismissed state law misrepresentation and breach of contract claims as preempted, it remanded the case to the trial court to consider the impact of the federal law of ERISA (including *Nachwalter*) because that question had not been considered by the lower court. *Id.* at 93, 516 N.E.2d at 1242. In applying the federal law of ERISA to Petitioners' claims, the lower Ohio courts relied in part upon the *Nachwalter* case in holding for AGP. In sum, the trial court

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[16] The Court in *Lewis* v. *Seanor Coal Co.* stated as follows:

> [Oral agreements] would expose employer and union representatives alike to the temptations of corrupt bargains, for it would permit the union to extract from an employer a secret promise to pay some other amount into the fund without requiring such payments to become a matter of record and thus would frustrate the purpose of § 302(c)(5). Moreover, the employees have a right to know if the obligation to make the payments into the fund is modified; otherwise they might be led to remain at their jobs in reliance on the benefits which the formal agreement has promised, after they have been eroded by oral modification of the obligation to make the payments supporting such benefits.

Lewis, 382 F.2d at 443.

[17] Petitioners consist of of only 7 out of more than 30 eligible participants in the plans. That Petitioners' individual claims regarding oral promises cannot be allowed to influence other participants' funding levels further demonstrates why such claims of oral promises are unenforceable under ERISA.

and the intermediate court followed precisely the analysis mandated by the Ohio Supreme Court in the *Ralyon* decision.[18] The combination of the federal courts' decisions and the *Ralyon* decision provides all the precedent needed to support the decisions of the courts below.

It is also worthy of note that the instant case stands as a very clear example of why Congress preempted the field in the case of existing written ERISA plans. When an employer, such as AGP, has a qualified written plan that clearly provides funding and benefit levels for each participant therein, maverick claims by some of the participants, such as Petitioners (7 of over 30 eligible participants), that are based upon supposed oral statements contradicting the terms of the plan itself cannot proceed in light of ERISA. To rule otherwise would allow any beneficiary to attempt to prove his own peculiar claim for special funding or benefits under the plan in a manner that, if successful, would deplete the remaining funds for other participants. This is exactly the type of result ERISA was intended to prevent.

As a result, the Ohio lower courts correctly applied controlling federal law in entering summary judgment on Petitioners' claims of breach of oral contract seeking to modify AGP's ERISA plans. Because the Ohio lower courts correctly applied controlling federal law, there is no reason for this Court to review the Ohio appellate court's decision.

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[18] In a futile attempt to avoid the mandate of *Nachwalter* and *Ralyon*, Petitioners cite to *Northwest Administrators, Inc.* v. *B.V. & B.R., Inc.*, 813 F.2d 223 (9th Cir. 1987). Unlike the situation here, that case dealt with an attempt to explain an ambiguous word in an ERISA contract, *not* an attempt to vary or add to its terms. Further, the court in *Northwest Administrators* adopted and cited with approval the rule in *Nachwalter*. *Id.* at 226-27 ("[A]n oral agreement or tacit understanding between Mid-Valley and the union that conflicts with or alters the meaning of the written agreement should not be considered"). Thus, *Northwest Administrators* is no authority for Petitoners' efforts to vary the terms of the written plan documents in this case.

CONCLUSION

Despite Petitioners' rhetoric, it was (and is) beyond genuine dispute that their claims seeking to compel higher levels of contributions to their individually directed pension and profit-sharing plan accounts (which contributions determine benefits) do "relate to" AGP's pension and profit-sharing plans. Under the clear wording of 29 U.S.C. § 1144(a), Petitioners' state law claims are therefore specifically preempted in favor of ERISA standards. When judged under federal ERISA standards, Petitioners' claims for breach of oral (or informal written) promises are barred as a matter of law. *Nachwalter* v. *Christie*, *supra*; *Richland Hospital, Inc.* v. *Ralyon*, *supra*.

By drawing attention away from the precise legal standard to be applied, and by alleging conflicts that do not in fact exist, Petitioners would have this Court accept this case and then rule that their effort to compel a change in funding of their ERISA plans does not "relate" in any way to these plans. Such a request borders on absurd as the funding of a plan goes to the very core of an employer's obligations thereunder, as well as the benefits to be derived therefrom by employees. In short, funding levels (provided for in a plan itself) obviously "relate to" the plan.

For these reasons, this Court should deny the requested writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief of Respondents Opposing Jurisdiction upon Joseph R. Jordan, Counsel of Record for Petitioners, 2008 Carew Tower, Cincinnati, Ohio 45202, this 27th day of February, 1989.

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